92-1303

Supreme Court, U.S.
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NO. 92-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LAKELAND LOUNGE OF JACKSON, INC. PETITIONER

V.

CITY OF JACKSON, MISSISSIPPI RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MATTHEW M. MOORE
ATTORNEY AT LAW
P. O. Box 171
518 East Capitol Street
Suite 201
Jackson, MS 39205
(601) 355-5333
MSB #3451

Attorney for Petitioner

QUESTIONS PRESENTED

Whether evidence of a factual basis to support a finding that adult entertainment establishments cause secondary effects must actually be considered by the governing authorities, when regulating First Amendment protected speech by zoning, under City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Whether the Fifth Circuit's test for availability of alternative avenues of communication complies with Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

PARTIES TO THE PROCEEDING

The following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. The City of Jackson, Mississippi, Defendant/Appellant;
2. Kane Ditto, Mayor, City of Jackson, Mississippi;
3. E C Foster, Council member for the City of Jackson, Mississippi;
4. Derwood Boyles, Council member for the City of Jackson, Mississippi;
5. Louis Armstrong, Council member for the City of Jackson, Mississippi;
6. Kenneth Stokes, Council member for the City of Jackson, Mississippi;
7. Marcia Weaver, Council member for the City of Jackson, Mississippi;
8. Luther Roan, Jr., Council member for the City of Jackson, Mississippi;
9. Margaret Barrett, Council member for the City of Jackson, Mississippi;
10. Jerome Magee, Jonesboro, Arkansas, President of Lakeland Lounge of Jackson, Inc.;
11. James Henderson, Jackson, Mississippi, Secretary of Lakeland Lounge of Jackson, Inc.;
12. Matthew M. Moore, attorney for plaintiff/appellee.
13. Craig E. Brasfield, attorney for defendant/appellant;
14. Leyser Q. Morris, attorney for defendant/appellant.

There is no parent or subsidiary company to be listed.

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IN THE
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OCTOBER TERM, 1992

LAKELAND LOUNGE OF JACKSON, INC. PETITIONER

V.

CITY OF JACKSON, MISSISSIPPI RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered on October 5, 1992.

OPINIONS BELOW

The final judgment of the United States District Court for the Southern District of Mississippi was filed on May 1, 1992. (App. p.27) A panel of the United States Court of Appeals for the Fifth Circuit issued an opinion on October 5, 1992. (App. p.30) The district court opinion is not reported. The court of appeals opinion is reported at 973 F.2d 1255 (5th Cir. 1992). Rehearing was denied on November 4, 1992. (App. p.47)

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1) (1988), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Jurisdiction in the district court was invoked under 28 U.S.C. § 1331, 1343(a)(3), for petitioner stated a claim for violation of its constitutional rights under 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech..."

STATEMENT OF THE CASE

This case originated by the filing of a complaint by Lakeland Lounge of Jackson, Inc. (Lakeland), on February 27, 1992, seeking declaratory and injunctive relief against the City of Jackson, Mississippi (City). Lakeland requested a declaration from the District Court that the City's zoning ordinance amendments regarding adult entertainment establishments violated its free speech rights protected by the First Amendment to the United States Constitution. Lakeland also sought preliminary and permanent injunction prohibiting the City from enforcing the ordinance amendments at issue.

Following the presentation of evidence on the trial on the merits, the District Court, on April 30, 1992, issued a bench opinion granting declaratory relief and a permanent injunction against enforcement of the zoning ordinance amendments. The District Court found that the zoning ordinance amendments failed

to meet constitutional muster on two separate grounds, which are:

1) The City Council lacked a factual basis upon which it could rely in making its findings that adult entertainment establishments caused secondary effects; and,

2) Even if the City had a factual basis to rely on in finding that adult entertainment establishments cause secondary effects which justify regulation, the ordinance amendments adopted by the City failed to provide reasonable alternative sites for adult entertainment establishments.

After the District Court entered its final judgment on May 1, 1992, the City filed its notice of appeal, and moved for an expedited briefing schedule. The Fifth Circuit Court of Appeals ordered an expedited briefing schedule, heard oral argument on July 6, 1992, and rendered its panel decision on October 5, 1992.

In a split decision, two members of the panel found the district court's findings on both issues to be clearly erroneous and reversed the judgment of the district court. Honorable Henry A. Politz, Chief Judge, dissented and wrote an opinion which would have affirmed the trial court.

STATEMENT OF FACTS

In September, 1991, a nightclub known as "Tiffany's Cabaret" opened in the City of Jackson. (Mot. for TRO p.7) Upon opening, Tiffany's began to advertise the fact that it provided entertainment in the form of topless dancing. There was significant public outcry in opposition to Tiffany's, and calls were made upon the elected officials for the City of Jackson to close Tiffany's operation. The City attempted to close Tiffany's for various technical code violations, but was unsuccessful.

Within a few weeks after the opening of Tiffany's Cabaret, another nightclub began providing adult entertainment in the form of topless dancing in Jackson. The opening of this second topless club within less than a month fanned the flames of the vocal opposition seeking to prohibit the operation of adult entertainment establishments in the City. In an effort to calm the public outcry, the Mayor of the City of Jackson and other elected officials made clear their intent, through statements to the press, that they would do everything possible to close down any existing adult entertainment establishments and prohibit the introduction of any new establishments to the City.

In January, 1992, the plaintiff in this case, Lakeland Lounge of Jackson, Inc., was established for the purpose of operating a restaurant and/or lounge at which adult entertainment in the form of topless dancing would be provided. Lakeland obtained necessary licenses for operating a nightclub and attempted to obtain permits from the City to remodel its business premises.

On January 28, 1992, the City Council, by a vote of 6-1, adopted a text amendment to the City's Zoning Ordinance, which amendment purports to regulate the location of adult entertainment establishments within the City of Jackson. (App. p.49) The City Council was provided a draft ordinance with prefabricated findings of fact in its preamble, but was given no studies, no written summary of studies, nor any oral summary of studies to support the proposed findings under the ordinance. Adult entertainment establishments are absolutely prohibited from all areas of the City, except those areas designated as light industrial. Permitted uses in Light Industrial Zoned Areas do not ordinarily include commercial establishments such as bookstores, theaters, arcades or motels, but rather, include uses such as light manufacturing industries, truck terminals, warehouses, building material supply yards and mobile home trailer parks.

The text amendment also provides that adult entertainment establishments may be located in the areas zoned

C-4, the central business district. However, such businesses may only locate in the central business district as a use permit, which requires advance approval from the City Planning Board as well as the City Council. As a legal, political and practical matter, no such use permit will be issued by the City. Furthermore, when examined in relation to the 1,000 foot setbacks from churches, schools, parks, playgrounds and residentially zoned areas, there is no area remaining in the C-4 Zone for locating adult entertainment establishments.

The amendment to the zoning ordinance also provides that no adult entertainment establishment shall be located within 250 feet of any other such use, and shall not be located within 1,000 feet of any residentially zoned property, church, school, park, or playground. These distance restrictions effectively bar the location of adult entertainment establishments from a significant portion of that area of the City of Jackson currently zoned light industrial.

Notwithstanding the aforementioned restrictions on locations of adult entertainment establishments, the ordinance provides a grace period for existing, non-conforming businesses. Under the "grandfather clause" any pre-existing, nonconforming businesses shall conform to the provisions of the ordinance within a period of three years from the adoption of the ordinance.

Plaintiff filed its Complaint in this action on February 27, 1992, and filed its Motion for Temporary Restraining Order, or, Alternatively for Preliminary Injunction. Plaintiff requested the Court to find that the amendments to the zoning ordinance adopted by the City of Jackson on January 28, 1992, unconstitutionally infringed upon plaintiff's right to free speech, in that the ordinance fails to provide reasonable alternative avenues of communication. After conducting a trial on the merits, the District Court entered its opinion declaring the zoning ordinance amendments to be unconstitutional and entered its judgment enjoining the City from enforcing the ordinance amendments at issue.

In a 2-1 decision a panel of the Fifth Circuit Court of Appeals reversed the judgment of the district court. In the majority opinion, the panel held the district court's finding that the City Council had an insufficient factual predicate upon which to base its ordinance upon secondary effects was clearly erroneous. The majority opinion further held that the district court's finding that the City's ordinance failed to provide reasonable alternative sites for regulated expression was also clearly erroneous.

ARGUMENT

I. WHETHER EVIDENCE OF A FACTUAL BASIS TO SUPPORT A FINDING THAT ADULT ENTERTAINMENT ESTABLISHMENTS CAUSE SECONDARY EFFECTS MUST ACTUALLY BE CONSIDERED BY THE GOVERNING AUTHORITIES, WHEN REGULATING FIRST AMENDMENT PROTECTED SPEECH BY ZONING, UNDER CITY OF RENTON V. PLAYTIME THEATRES, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The ordinance at issue in this case clearly impacts First Amendment expression rights and presumptively violates the First Amendment if it was "enacted for the purpose of restraining speech on the basis of content. In order to validate such an ordinance, the City must prove that it is "designed to serve a substantial governmental interest" and it may "not unreasonably limit alternative avenues of communication." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986).

The Fifth Circuit Court of Appeals opinion placed great weight on the fact that the preamble to the City's ordinance indicated the Council's concern with secondary effects. "The assertion of state interest, however, is not enough." Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. at 2184, 68 L.Ed.2d 671 (1981). "The City must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered by the City in passing the ordinance." 101 S.Ct. at 2185.

In Renton, the Court found that it was permissible for the City Council to rely on studies developed by other municipalities. Specifically, the Court found that "the opinion of the Supreme Court of Washington in Northend Cinema, which

was before the Renton City Council when it enacted the ordinance in question..." provided detailed findings regarding secondary effects of adult theaters. 475 U.S. at 51, 89 L.Ed. 2d at 40. The Court held that Renton's City Council could rely on these findings in adopting its ordinance.

In SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988), the Houston City Council appointed a committee to study whether adult businesses caused secondary effects which would justify governmental regulation. In SDJ, Inc., the Court found that the City Council considered studies from other cities in determining that adult oriented business caused deleterious secondary effects and determined that these studies gave the council a sufficient factual basis to justify the requisite governmental interest to uphold the ordinance.

Lakeland does not contend that Jackson could not rely on studies from other cities. Lakeland does assert that Renton and SDJ, Inc., require the City Council, which is responsible for enacting the ordinance at issue, to have had a factual basis before it, upon which it relied, at the time of adoption of the ordinance.

The City Council members were provided with no information in conjunction with the presentation and adoption of the ordinance at issue. The preamble to the ordinance recites that the Council finds "substantial evidence, including numerous studies, reports, and findings on the potential harmful effect of adult entertainment users made by other cities, experts, city planners, etc., which document that such uses adversely affect property values, cause an increase in crime, encourage businesses to move elsewhere, and contribute to neighborhood blight." Lakeland Lounge of Jackson, Inc. v. City of Jackson, Mississippi, 973 F.2d 1255, 1258 (5th Cir. 1992). However, the record fails to disclose the factual basis which the City Council relied on to support its asserted finding.

The Fifth Circuit held that it was sufficient that the City planning department, which assisted in drafting the ordinance, had reviewed a study relating to secondary effects caused by adult entertainment establishments. It is respectfully submitted

that Renton and SDJ, Inc., require more. Both of these cases make specific findings that the city councils for the respective cities had evidence before them which they relied upon. The City Council of Jackson had nothing before it other than the ordinance.

The Fifth Circuit opinion also alluded to the fact that five council members attended a public hearing regarding the proposed ordinance. Although there is no direct proof in the record that a discussion regarding secondary effects occurred at that public hearing, the Fifth Circuit held that the attendance of some of the council members at that public hearing gave them some information regarding secondary effects which they could rely on in making their findings.

The burden is upon the City to show that it had a basis in fact to buttress its assertion that a state interest is involved, and to show that the factual basis was considered by the governing authorities when they adopted the ordinance. The City failed to meet its burden of proof as required by Renton, and the Fifth Circuit ignored the clear dictate of Renton to facilitate its decision to rule in favor of the City.

II. WHETHER THE FIFTH CIRCUIT'S TEST FOR AVAILABILITY OF ALTERNATIVE AVENUES OF COMMUNICATION COMPLIES WITH RENTON V. PLAYTIME THEATRES, INC., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The district court considered evidence presented by the City and Lakeland regarding characteristics of real estate in Jackson which was located in Light Industrial Zones and more than 1,000 feet from a protected use; i.e., school, church, park, playground or residentially zoned area. The City's proof went only to show what areas of light industrial zones existed after consideration of protected uses. Lakeland's proof, on the other hand, addressed legal and physical characteristics which made it

impossible to operate an adult entertainment establishment in the areas designated as available. In addition, Lakeland provided proof that many locations advanced as available by the City were in fact within 1,000 feet of a restricted use and, therefore, were not available under the express terms of the ordinance.

The district court carefully considered the evidence presented and found that the ordinance failed to provide reasonable alternative avenues for protected expression as required by Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Renton opinion, in regard to municipalities regulating adult entertainment uses stated, "The First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the City,..." 475 U.S. at 54. The district court found that the effect of the City's zoning ordinance was to suppress or greatly restrict access to lawful speech, in violation of the Supreme Court's decision in Young v. American Mini-theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The district court's findings on this issue are not clearly erroneous and are entitled to the protection afforded by Fed.R.Civ.P. 52(a).

Lakeland has never contended that it is entitled, under the First Amendment, to be able to obtain sites at bargain prices. Renton specifically declares that no such right exists. However, Lakeland does assert that it is entitled to a market place within which to compete. The City's ordinance does not provide that market place, and it, therefore, suppresses and greatly restricts access to lawful speech.

The Fifth Circuit ignored the instruction set forth in Renton that the ordinance must provide reasonable alternative avenues for protected speech. In Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982), the Fifth Circuit considered the issue and provided guidance as to what criteria should be evaluated to determine if a location is constitutionally available. The opinion stated:

> The Galveston ordinance bans adult theaters outright from much of the city. The remaining areas of the city are off-limits if too close to certain structures such as churches, schools, and residential areas. Basiardanes introduced maps of the city in evidence showing what oppressive options remained to an aspiring promoter of adult films. In the ten percent to fifteen percent of the city not categorically banned, adult theaters may operate only in the industrial zones at a great distance from other consumer-oriented establishments. Few access roads lead to the permitted locations, which are found among warehouses, shipyards, undeveloped areas, and swamps. These locations are poorly lit, barren of structures suitable for showing films, and perhaps unsafe. In theory they are available to adult movie proprietors and patrons, but in fact they are completely unsuited to this use.

682 F.2d at 1214.

The Fifth Circuit further stated that "The district court erred in failing to consider the consequences of confining adult theaters to 'the most unattractive, inaccessible and inconvenient areas of a city.' Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d at 336 (holding that the restriction of abortion facilities to undesirable areas places a significant burden on a woman's decision whether to have an abortion.)" 682 F.2d at 1214.

The effect of the Fifth Circuit opinion is to hold that if any real estate in the City is available, without regard to whether it is possible to develop it for use as an adult entertainment use, then the requirements of Young v. American Mini-theaters and Renton v. Playtime Theatres are met. More is required in order for the Court to find the site reasonably available.

A panel of the Fifth Circuit Court in Woodall v. City of El Paso, 950 F.2d 255 (5th Cir. 1992) made a lengthy and reasoned analysis of the Renton decision and its requirements that city's refrain from effectively denying a reasonable opportunity to open and operate adult businesses within the city. The panel concluded that "cities that allocate only completely unsuitable land for adult business use do exactly what the Court proscribed in Renton and Young: effectively suppress protected speech."

On petition for rehearing, the panel modified its opinion by withdrawing the discussion entitled "Unavailable Land under Renton". Woodall v. City of El Paso, 959 F.2d 1305 (5th Cir. 1992). The withdrawal was not because it was an incorrect statement of the law, but rather, "because the court regards that discussion unnecessary to decide this case." 959 F.2d at 1306.

Lakeland and the City went to trial on the assumption that Woodall I was the proper interpretation of Renton. The district court heard the evidence and made its ruling in reliance on Woodall I. Lakeland asserts that the language in Woodall I, although subsequently withdrawn, is an appropriate analysis of the law applicable to the facts of this case. Lakeland further asserts that the interpretation of Renton made by the Fifth Circuit in the case at bar does not follow the precedent of Renton and should be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

MATTHEW M. MOORE
ATTORNEY AT LAW
P. O. Box 171
518 East Capitol Street
Suite 201
Jackson, MS 39205
(601) 355-5333
MSB #3451

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LAKELAND LOUNGE OF JACKSON, INC.
PLAINTIFF,

V. CIVIL ACTION NO. J92-0123(B)

CITY OF JACKSON, MISSISSIPPI
DEFENDANT.

HEARING ON MOTION FOR TEMPORARY RESTRAINING ORDER
VOLUME 3 OF 3 VOLUMES

BEFORE: THE HONORABLE WILLIAM H. BARBOUR, JR., UNITED STATES DISTRICT JUDGE

DATE: MARCH 10, 11, AND 13, 1992

PLACE: JACKSON, MISSISSIPPI

APPEARANCES:

COUNSEL FOR PLAINTIFF: MR. MATTHEW M. MOORE

COUNSEL FOR DEFENDANT: MS. LESLIE SCOTT
MR. EUGENE C. STONE
MS. SARAH O'REILLY EVANS

COURT REPORTER: MS. CELESTE O. WERKHEISER, RPR-CM
245 E. CAPITOL, ROOM 534
JACKSON, MISSISSIPPI 39201
(601) 965-5135

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COMPUTER-AIDED TRANSCRIPTION

(March 13, 1992.)
(Closing arguments had, not transcribed per instructions.)

THE COURT: The Court has before it the motion of the Plaintiff for a temporary restraining order. The Court has heard the evidence and argument of counsel, has considered those together with the exhibits which have been introduced into evidence in this case. In this case the City of Jackson passed an amendment to its zoning ordinance by which it attempts to regulate certain adult entertainment establishments. Under the amended ordinance there are definitions of adult entertainment, including topless dancing, which is at issue in this case.

The Plaintiff has leased a location on Lakeland Drive, in Jackson, Mississippi, at which it proposes to conduct a topless bar. The ordinance passed by the City of Jackson does not permit such a use at that particular location. The ordinance granted a three-year grandfather exception to existing businesses at the time that the ordinance was adopted.

The ordinance was adopted on January 28, 1992, effective February 27, 1992. The Plaintiff filed its articles of incorporation with the Secretary of State on January 27, 1992.

The Jackson City Council had before it a proposed ordinance from January 21, 1992. It is clear that prior to that time it was known to the Plaintiff that the City was preparing the

proposed ordinance which would regulate the type of business which it proposed to conduct.

The City claims that this ordinance is a content neutral time, place, and manner regulation which does not unreasonably limit alternative avenues of communication, claiming that it passed the ordinance in order to combat the secondary effects of topless bars on their surrounding neighborhoods. The Plaintiff claims that the ordinance is an unconstitutional prohibition on its First Amendment rights to freedom of expression.

The Court heard proof as to how the statute was proposed and adopted. The City of Jackson has a substantial staff of city planners and other experts in the field of zoning ordinances. It also has a Planning Board, as well as the City Council itself. The staff of the Planning and Zoning Division in the City of Jackson did considerable research at the request of the mayor's office in formulating the proposed amendment to the ordinance.

It sent off to a city planners association and received a packet of information which included a study of the effects on surrounding neighborhoods of this type of adult entertainment. The professionals in the City staff prepared a proposed ordinance and presented it to the Planning Board, which held a public hearing. At that public hearing were five of the seven council members, including the one councilman who voted against the adoption of the ordinance.

The record is extremely slim as to what discussion of the studies from other cities was had at that Planning Board meeting. Immediately after the Planning Board meeting, the City Council took up the matter and passed the ordinance.

There has been absolutely no testimony before this Court by any council person as to whether he or she considered the studies before voting for the ordinance or whether anything was presented to the council. Mr. Greene, the City's man in charge of this proposed ordinance, did not testify as to what specifically was presented to the council itself.

It is not clear as to whether this packet of materials that was received by the staff was ever submitted to the City Council. The minutes of the Planning Board do reflect that there was some discussion of these studies. The amendment to the ordinance itself perfunctorily mentions the studies but does not specifically state that the City Council itself considered any studies.

The Plaintiff sought a building permit for the location at which it proposed to conduct its business. It is clear that the City required certain things under its procedures, including architectural drawings, certification by engineers, or others, that parking was adequate and in compliance with other zoning ordinances, and things of that nature.

The Plaintiff advised the zoning people that it intended to conduct a topless bar at this location. The City zoning people denied the application for a building permit at that location because the use was in violation of the new amendment to the zoning ordinance. The Plaintiff then filed its complaint in this case seeking the present temporary restraining order enjoining the City from enforcing the statute, claiming that the ordinance is unconstitutional.

The City in answer to the constitutionality of the ordinance, presented a city map, which was introduced into evidence, with 21 photographs mounted on it. Colored strings run from the photographs themselves to pins which have been placed at the particular locations depicted by the photographs. The City's contention is that there are at least these 21 locations which are available as alternatives to the Plaintiff's location and that each of these locations would comply with the amended ordinance for the use to which the Plaintiff would put the property, that is, for the operation of a topless bar.

In opposition to the testimony regarding these sites, the Plaintiff presented a city planner who testified that according to his measurements several of the sites were within 1,000 feet of residential areas, as prohibited by the ordinance; that others were within 1,000 feet of schools, playgrounds or parks, as prohibited

by the ordinance; and that yet others were within 1,000 feet of a church, which is prohibited by the ordinance. Also, the Plaintiff's expert testified that six of the sites at least, and maybe seven, did not have adequate parking and would not pass muster on the general zoning ordinances of the City of Jackson, which requires a certain amount of parking for certain amounts of square footage of patron space within the building.

The Defendant, on the other hand, had its people testify that they had canvassed the light industrial areas which are areas in which this activity is permitted, and had found these sites, and that these sites would all qualify.

There was disagreement over what constitutes a school or what constitutes a park or what constitutes a playground. The City zoning ordinance states that if there are matters that come up regarding definitions, that the planning administrator in the City zoning office has the discretion to decide the issues. Here, for instance, we have the question of whether the YMCA outdoor swimming pool and exercise area is a park or a playground. There is also an issue as to whether a training center for handicapped adults is a school. The place is known as Willowood School.

The Court realizes that this matter is before the Court on relatively short notice on a temporary restraining order and that the deficiencies in the proof from both sides is, at least in part, a result of inability to completely prepare for a hearing such as this.

The Court must consider whether the Plaintiff has carried its burden of proof to prove the four Canal factors, that is, that there is a substantial likelihood the Plaintiff will ultimately succeed on the merits, that there is a substantial threat of irreparable harm to the Plaintiff if an injunction is not granted, that the injury to the Plaintiff if the injunction is not granted will outweigh the harm to the Defendant if the injunction is granted, and the public interest.

In regard to the issue of whether the Plaintiff will suffer irreparable harm if the injunction is not granted, the Plaintiff has

argued two issues: first, that monetary harm will continue if the injunction is not granted; and secondly, that the denial of its constitutional rights is irreparable harm in and of itself. The Court notes that the issue of monetary damages is not proper for consideration in injunctive matters. The Plaintiff, if the Plaintiff is harmed, can sue for damages and therefore has an adequate remedy at law.

The question of whether or not the Plaintiff's constitutional rights of First Amendment freedom of expression have been abridged is a very close question, which the Court will discuss in a minute.

The next issue concerns whether the injury to the Plaintiff if the injunction is not issued will outweigh the harm to the Defendant if it is. Here, the Defendant is entitled for deference to be given to its duly passed ordinances, and there is a presumption that ordinances passed by a municipality are in the best interest of its people. On the other hand, the Plaintiff relies, again, on alleged denial of its constitutional rights as its injury here. The Court notes, however, that the Plaintiff is seeking to have its constitutional rights adjudged in regard to one particular location, and that is the Lakeland Drive location, and that there is a possibility that there are other locations within the City at which the Plaintiff could conduct its operations.

The public interest factor involves a balancing between the interest of citizens of the City of Jackson having its ordinances enforced and upheld, but also the public and the City of Jackson have an interest that the City not abridge the constitutional rights with any of its citizens.

The Court notes in this regard that the public does, in fact, have other means of viewing the entertainment provided at this type of establishment because there are, in fact, two other establishments in the City of Jackson providing topless dancers at the present time. Essentially this evaluation of these four factors then must turn on the likelihood of success of the Plaintiff on the merits of this action. This type of ordinance has been

upheld by the United States Supreme Court in the City of Renton v. Playtime Theatres, 475 U.S. 41, a 1986 case.

Here, as in Renton, the City of Jackson has sought to regulate the time, place, and manner of this type of adult entertainment rather than to exclude it entirely. It has selected the "disbursement method" as opposed to the "combat zone method" of regulation. On its face the statute is content neutral, and on its face the ordinance was adopted to combat the secondary effects of such adult entertainment in the surrounding neighborhoods.

In order to uphold this statute, the City must show that it, in fact, adopted the ordinance in order to combat these secondary effects; and to do that, the City has to show that it, in fact, studied those secondary effects. As the Court has already stated, the issue is cloudy at best. It would have been much easier on for the Court in deciding this issue if the City Attorney's Office and the zoning and planning staff had taken their substantial efforts one step further and required the City Council to specifically sit down and study the materials that they say they did study. The City Council may have done enough minimally to meet this condition. The Court realizes that there are some statements in the ordinance itself and in the minutes of the Planning Board that might be taken to indicate that.

The Court has considered each of the 21 sites in view of the conflicting testimony as to whether they are, in fact, available for use without violating the ordinance. There appear to be at least a few of the sites that would be available under the ordinance, although the Court has been left considerably up in the air by the lack of firm and convincing testimony from either side.

Because this is a motion for a temporary restraining order and because the issues raised have been presented by conflicting evidence and some of the things are unclear to the Court, the Court is going to deny the motion for temporary restraining order on the basis that the Plaintiff has not proved that there is a substantial likelihood of success on the merits, and

because the Court at this stage would balance the public interest in favor of enforcement of the ordinance.

In making this ruling, the Court finds that this is one of those instances in ruling on a temporary restraining order where the Court can see that the outcome on a preliminary injunction or at the trial on the merits may very well be the opposite.

That will be the ruling of the Court. The motion for a temporary restraining order is denied. The Court, accordingly, will grant a hearing on the preliminary injunction, which I presume, Mr. Moore, you wish to request?

MR. MOORE: Yes, Your Honor.

THE COURT: We will have to find a time to do that and I will ask the attorneys to confer with my courtroom deputy to see when an appropriate time can be given. I think that I may have some time about the third week from now, next week being the first week. I am going to be in Vicksburg next week and the week after. I will have some time after that for a preliminary injunction. I would ask the attorneys to consider advancing this matter for trial on the merits at that time.

It seems as though we have got a relatively uncomplicated issue before us, that is, whether the ordinance passes constitutional muster; and other than getting the proof lined up so that you can show the Court clearly one way or the other about alternative sites and what the City Council did or did not consider, that there should not be a whole lot more to the case.

If you want to confer with each other and confer with Ms. Bond about a setting and about the procedures, I have another hearing at this time that I should be through with in 45 minutes or so, and I will be glad to consult with you later this afternoon if you wish.

All right. If does either party have anything further to request the Court in regard to the ruling at this time?

MR. STONE: No, Your Honor.

MR. MOORE: Not from the Plaintiff, Your Honor.

THE COURT: If not, then the Court will stand in recess in regard to this matter. The attorneys may be excused.

(Recess.)

* * * * * * * * * * * * *

CERTIFICATE

I, Celeste O. Werkheiser, Registered Professional Reporter, Certificate of Merit, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages, pages 197 through 209, contain a full, true, and correct transcript of the proceedings had in the aforenamed case at the time and place indicated.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 25th day of March, 1992.

Celeste O. Werkheiser

My Commission Expires:
June 7, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LAKELAND LOUNGE OF JACKSON, INC.
PLAINTIFF,

V. CIVIL ACTION NO. J92-0123(B)

CITY OF JACKSON, MISSISSIPPI
DEFENDANT.

BENCH OPINION

BEFORE: THE HONORABLE WILLIAM H. BARBOUR, JR., UNITED STATES DISTRICT JUDGE

DATE: APRIL 30, 1992

PLACE: JACKSON, MISSISSIPPI

APPEARANCES:

COUNSEL FOR PLAINTIFF: MR. MATTHEW M. MOORE

COUNSEL FOR DEFENDANT: MR. CRAIG E. BRASFIELD

COURT REPORTER: MS. CELESTE O. WERKHEISER, RPR-CM
245 E. CAPITOL, ROOM 534
JACKSON, MISSISSIPPI 39201
(601) 965-5135

(April 30, 1992.)

THE COURT: The Court has considered the testimony and exhibits in the case and arguments of counsel and is now prepared to enter a bench opinion containing its findings of fact and conclusions of law. In the event this case is later transcribed for appeal or other purposes, the Court will reserve the right to edit or amend this opinion. In doing so, however, the Court will not change the substance of the findings or result.

This case involves the constitutionality of an amendment to the zoning ordinances of the City of Jackson whereby the City seeks to regulate the location of certain adult entertainment establishments, including bookstores, theaters, and at issue in this case, topless cabarets.

In September of 1991, a topless cabaret opened in the City of Jackson under the name of Tiffany's. That caused a considerable amount of opposition, particularly in the general neighborhood where it was located. That neighborhood was located in Councilwoman Margaret Barrett's ward. She proposed an ordinance to control such establishments.

On request of the City Council, Bill Harden, a City planner with the City Planning and Zoning staff, called the American Planners Association, an association of city planners, for materials and assistance concerning what types of ordinances might be considered for adoption under these circumstances. The City Planning and Zoning Board and the City's legal staff, upon receiving the package of material from the American Planners Association, which has been introduced into evidence as Defendant's Exhibit 4, conferred and drew up a proposed amendment to the zoning ordinance, that amendment being the one which is under consideration in this lawsuit.

On January 21, 1992, at 5:00 p.m., a hearing was conducted on the proposed ordinance before the City Planning Board. In attendance at that meeting were five of the seven City councilpersons, including four who voted in favor of the ordinance. At that hearing, which was a public hearing, the

ordinance was presented and three members of the public made comments.

The only testimony that the Court has concerning what went on at that hearing came from the testimony of Quintus Greene of the City Planning and Zoning staff, and Mrs. Barrett, the councilwoman. The testimony showed no consideration of the materials sent by the American Planners Association nor any other type of material that either the City Planning and Zoning people had or that Mrs. Barrett herself had. Thereafter, at 7:00 o'clock on the same evening, of January 21, 1992, at the regular City Council meeting, the amendment to the ordinance was passed by a vote of 6 to 1.

MR. MOORE: Your Honor, pardon the interruption. I don't believe there's any dispute between the parties that at that January 21 meeting the proposed amendment was considered and held.

THE COURT: All right. Yes, sir. Thereafter at 7:00 o'clock on January 21, 1992, in accordance with City procedures, the ordinance was presented. Under normal City business, ordinances and amendments thereto are presented at one meeting and then held for one week for actual vote one week later. That was done in this case and the ordinance was actually passed by vote of 6 to 1 on the next meeting, which occurred on January 28, 1992.

Mrs. Barrett testified that at the City Council meetings on January 21 and 28 that there was no discussion whatsoever of the ordinance, that it simply was presented and passed. The ordinance itself, which is in evidence, has in its preamble that the City Council finds that there is a legitimate reason for passing the ordinance because of the secondary effects of these types of establishments upon the neighborhood land values and upon crime.

The Plaintiff, Lakeland Lounge of Jackson, Incorporated, is a Mississippi corporation, which was organized for the purpose of opening and operating a topless cabaret in the City of Jackson. The Plaintiff filed articles of incorporation with the

Secretary of State on January 27, 1992, after the ordinance was initially presented for consideration to the City Council, but before it could be formally enacted on January 28. The effective date of the ordinance is February 27, 1992.

On March 3, 1992, Lakeland Lounge of Jackson, Incorporated, submitted the required documentation for a building permit application in regard to its proposed location on Lakeland Drive, which is within the City of Jackson, but is without the area authorized for such establishments by the amendment to the zoning ordinance.

The Plaintiff, Lakeland Lounge, has raised issue of whether or not it was in business before the passage of the amendment to the ordinance and, therefore, would fall under the three-year grandfather exemption period contained in the amendment to the ordinance for adult entertainment establishments already doing business.

The Court finds that Lakeland Lounge was not in business as of either the passage date, January 28, 1992, of the amendment, nor of the effective date of the act, on February 27, 1992. In fact, that business as of this time has never opened. The simple fact that the business received a charter of incorporation does not in any way mean that it is doing or has been doing business. That is a very practical consideration. And this corporation has never opened for any type of business whatsoever.

The Court, accordingly, has before it a constitutional challenge to the ordinance. The ordinance allows adult entertainment businesses, including the type in which Plaintiff wishes to engage, to operate in commercial I-1 zones in accordance with the long-established zoning map for the City of Jackson. It also allows these establishments in commercial C-4 areas of the city, which basically are the downtown central business district areas. There is an exclusion, however, from those particular areas that requires these businesses to be located more than 1,000 feet from residential areas, parks, playgrounds, schools, or churches.

The challenge to the amendment to the ordinance made by the Plaintiff is basically on two grounds: number one, that the City Council did not properly consider the secondary effects on which it relies; and second, that the ordinance as adopted does not allow reasonable alternative avenues of expression for these types of businesses within the permitted areas. The courts generally adopt a deferential posture toward zoning ordinances. Ordinarily a zoning ordinance will be upheld if it is rationally related to a legitimate state interest and does not preclude all practicable uses of the property. Basiardanes v. The City of Galveston, 682 F.2d, 1203, at page 1212 (5th Cir. 1982.)

Different legal standards, however, are applied when the zoning ordinance intrudes upon communication protected by the First Amendment to the United States Constitution, which is what we have involved in this case. The ordinance in question clearly implicates First Amendment rights since the ordinance is not limited to adult entertainment establishments which feature obscene materials, as defined in Miller v. California, 413 U.S. 15 (1973).

Having found therefore that communication which at least has some minimal protection under the First Amendment is at issue here, the Court must determine whether the Jackson zoning ordinance is a constitutionally impermissible restriction. The United States Supreme Court has long held that regulations enacted for purposes of restraining speech on the basis of its content presumptively violate the First Amendment. Carey v. Brown, 447 U.S. 455 (1980), and Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

Freedom of expression by semi-nude dancers would fall under the broad First Amendment right of free speech. There are certain kinds of regulations, however, that are content neutral, and seek to regulate only the time, place, and manner under which communication may occur. That is what Jackson urges in regard to this ordinance.

At first glance, the zoning ordinance does not appear to fit neatly into either the content based or content neutral

category. The ordinance does treat bars, restaurants, cabarets, theaters, and bookstores that specialize in adult entertainment differently from those that do not.

The City argues that the difference in treatment between adult entertainment establishments and non-adult entertainment establishments is not aimed at the content of adult entertainment, but rather at the secondary effects that such businesses create in their surrounding neighborhoods, that is, that they reduce real estate values and that they cause an increase in crime. These secondary effects of adult entertainment establishments is what the City contends are the target of the zoning ordinance and not the actual content of adult entertainment itself.

Accordingly, under United States v. O'Brien, 391 U.S. 367 (1968), the Court must consider what the predominant concerns of the City were at the time that the ordinance was passed. It does not invalidate the ordinance merely because the restriction of protected speech may have been a motivating factor in passing the ordinance. What we are concerned with are predominant factors only.

The following factors are to be considered. Does the ordinance itself take note of the secondary effects? In this instance the answer is clearly yes. The preamble to the ordinance has a direct statement that the purpose of the ordinance is to protect against the secondary effects that such adult entertainment facilities have on property values and crime. The second factor is whether the City has attempted to regulate rather than totally prohibit the communication. Again, the answer is yes. The City has stated that such establishments may do business within particularly zoned areas rather than prohibiting them outright. The third factor is whether the existence of secondary effects have a basis in fact and whether that factual basis was considered by the City in passing the ordinance. Here, we have a situation which is an extremely close call.

As the Court has stated, the preamble to the ordinance, in fact, includes language of the secondary effects. The question presented by the facts of this case is whether the factual basis

stated in the preamble was, in fact, adequately considered by the City Council members in passing the ordinance.

The Supreme Court has recognized that one way for a municipality to meet the requirement is for it to conduct a study on the detrimental secondary effects that such a restricting ordinance will have.

The Supreme Court in the City of Renton v. Playtime Theaters, Inc., 475 U.S. 1132 (1986), page 1140, clearly holds that a municipality does not have to conduct new studies itself or produce independent evidence of detrimental secondary effects but may rely upon studies generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Here, the staff of the Planning and Zoning Department received the studies contained in Exhibit D-4, and the testimony is that they studied those materials. The testimony is that those materials were available to the City attorney's staff. The testimony is that the City attorney's staff and the Planning and Zoning Department, working together, formulated the ordinance which was adopted by the City Council.

It's clear that the City has the burden of proving the essential elements regarding the proper adoption of the ordinance. There is no testimony whatsoever that the City Council members themselves ever looked at the studies relied upon by its staff, or received any written summary of those studies, or received any oral summary of those studies.

The only testimony regarding the consideration of any studies was by Mrs. Barrett, who has testified that she had received materials concerning studies of detrimental secondary effects from some of her constituents. She did not testify that she received copies of the materials which the Planning and Zoning staff have relied upon.

Thus, under the status of the proof, the City staff considered the materials; the City Council members did not consider the materials, but presumably relied upon its staff to do so. The Court notes that the City has argued that the City

Council persons themselves have no staff and, therefore, must rely on the City's staff. The Court does not truly understand the distinction between the City's staff of city zoners and planners or legal staff and staffs that might have been available to the City Council. At any rate, the Court finds that there is no evidence that the members of the City Council itself specifically considered any studies whatsoever or relied upon them in the passage of the statute.

The question then becomes whether the City Council can rely solely on its staff. Certainly, this question would have been made easier had the City Council bothered to have given its attorneys or its professional planners the opportunity to give even a minimal presentation concerning the ordinance. It did not do so.

Although this is a close question, the Court finds that the City Council should have at a minimum allowed some presentation summarizing the secondary effects on which it purports to rely, and, accordingly, that the City Council has not produced any evidence that it relied upon any formal studies to reach the conclusion that there would exist secondary effects if these businesses would be allowed to continue to operate.

The Court accordingly finds that the City has not carried its burden of proof in making the necessary showing that the amendment to the ordinance was a content neutral regulation of the Plaintiff's First Amendment right of expression. The amendment is, therefore, unconstitutional.

Having determined that the amendment to the ordinance at issue is unconstitutional, it is not necessary to go further. However, the Court, since it has spent the amount of time that it has on this matter, will rule on the other issue on the assumption that the Court may be incorrect in its ruling that it has just stated. If the Court had ruled differently, there would still be a second inquiry as to whether the ordinance was constitutional, and that is whether the amendment to the ordinance, although designed to serve a substantial governmental interest, which the Court will assume for the purposes of this

portion of the rule, allows for reasonable alternative avenues of communication. This is the holding of Renton, 475 U.S., at page 50.

Although there is some confusion as to exactly what the test is regarding reasonable alternative avenues of communication as expressed in Renton, Basiardanes, and the recent case of Woodall v. City of El Paso, a Fifth Circuit opinion rendered January 9, 1992, in case No. 90-8269, reported at slip opinion at page 1628. The test seems to be whether there is available land that is physically, legally, and economically suited for adult entertainment businesses. Woodall, at page 1634, attempts to set forth the proper test required by Renton, wherein it states: "When Renton stated that the theater owners must fend for themselves in the real estate market on an equal footing with other respective purchasers and lessees, the Court obviously contemplated there was a market in which businesses could purchase or lease real property on which business could be conducted. A real estate market that provides no opportunity to compete cannot provide a reasonable opportunity to do so."

In footnote 5 on the same page, the Court made the following statements: "It is practically irrelevant to the First Amendment's alternative avenue availability inquiry whether a particular adult business with its management, financing, and capital cost can make a profit and comply with the challenge of the zoning ordinance." Later in the same footnote it stated: "In practical terms, this means that economic unsuitability determinations are to be made on a macroscale. Land is only economically unsuitable as a reasonable alternative avenue of communication if no adult business could possibly expect to profit by opening there."

Accordingly, the Court believes that the appropriate inquiry in determining whether the City has provided reasonable alternative avenues of communication are to judge the sites alleged to be available under the ordinance from a reasonable business standpoint for any businesses in the adult entertainment

field and not from the standpoint of the specific Plaintiff in this case.

In fact, in this case the Court has received no evidence as to the particular needs of the Plaintiff's business insofar as the type of building, usable square footage, particular locations, or any such other particular specifications.

The cases in which the Court has cited seem to suggest that the following are relevant factors. First, the percentage of total land area of the city left open for the particular use. The Court notes that in Woodall at page 1632, the Court concluded that where there is not a great demand for adult business space, the city does not have to provide a great number of alternative locations in its zoning law to meet First Amendment standards.

Here the proof shows that the entire area covered by the City of Jackson is 110 square miles, or approximately 70,400 acres. The City itself claims that it has, under the amendment to the ordinance, 879 acres of land available for adult entertainment uses. This computes out at approximately 1.2 percent. Other factors that are relevant are accessibility to roads and highways, the stages of development of the land as to whether it is raw land, whether it is served by utilities, whether there are structures that could reasonably be converted to the type of use desired. Here there is testimony that usually adult entertainment businesses go into second or third generation occupancy of buildings. The Plaintiff urges, accordingly, that the Court should exclude all vacant land as available sites on this basis. Also relevant are the types of development on the land available. In particular the testimony has shown that there should be some retail and/or commercial development in the area for the sites to be reasonable for adult entertainment purposes.

Both parties recognize generally the factors which the Court has stated and has argued and presented evidence concerning a number of sites. The City presented alternative sites at some 21 general areas and presented testimony regarding 32 specific sites. The City, of course, argued that the specific sites in some instances were large sites and would, accordingly,

offer more than one particular location for an adult entertainment business.

The Court considered all of the arguments for and against each of the 21 sites. The Court is not going to address each side site individually, but finds only four of the City's 21 areas as being reasonably available and that those areas present only eight to ten actual locations. The Court will address those specifically in a minute. The remaining areas located by the City to be within CI-1 zoning and which it claimed was more than 1,000 feet from residential areas, schools, parks, recreational areas, playgrounds were not reasonably available.

The Plaintiff presented expert testimony in the form of Joe Lustek who analyzed each of the sites. The City in its argument, for instance, conceded that Hawkins Field Industrial Park, containing over 100 acres, should be excluded from consideration, although it originally promoted that area, because that area is subject to certain restrictive covenants which could only be changed by the City Council. It is clear to the Court that where the City Council is opposing this type of establishment, that it is not going to change the covenants in an industrial warehouse area to accommodate cabaret topless dancing establishments. A number of areas proposed by the City to comply with the ordinance as amended are in remote areas of the city and are not in any area where other retail or commercial development is located. Clearly this type of area would not be reasonable from any macroeconomic analysis standpoint for any type of a retail business, which would be the general classification of topless cabarets.

Other areas lack access from public roads. One particular area claimed by the City was an area east of Interstate 55 occupied by a large automobile complex, Herrin-Gear, and with adjacent property occupied by a stables area. You might ordinarily think that a stables area would be available for commercial development. The proof showed, however, that the only access to that stables area is through the Herrin-Gear complex, that the stable area is not accessible by any public

street. The Court does not think it reasonable to expect any commercial establishment to have a fair opportunity to locate in such an area.

The City also had promoted as an alternative site the parking lot of a large shopping mall. This borders on the ridiculous. The parking area of a shopping mall simply is not available for any other type of development. It has a use of serving the shopping mall and it is not reasonable to expect that the shopping mall owners or tenants will allow any type of establishment, much less an adult entertainment cabaret, to be located thereon.

The Court mentions these things to show that much of the land claimed by the City to be reasonably available is not reasonably available. The Court, however, finds that the City has designated certain sites which would be available and would be reasonable for the location of adult entertainment type of businesses.

The City located its proposed sites that are available under the amendment to the ordinance on Exhibit D-9, a map of the city on which is located colored circles with letters in them. These areas will be referred to by the Court.

There is an area west of I-55 and north of High Street that is available under the ordinance. This particular area consists in part of vacant land on which an adult cabaret building could be built and of a now closed restaurant known as Frank's Restaurant, which would now be a second-generation building. That general area is in a high traffic area both in regard to High Street and Interstate 55 and would be highly visible to passing motorists and therefore would be an acceptable place for a retail commercial type of establishment.

The City has identified a number of buildings in Area I which is generally defined as the Commerce Street area. It is an older commercial area of the City of Jackson lying a few blocks from the downtown central business district. In that area are a number of buildings, one being the old Dennery's Restaurant building, another being a large warehouse. The Court finds that

there are three or four or possibly five sites in that area which would be available and feasible for adult entertainment purposes. The Plaintiff has suggested that the Court must consider not only the alternative sites for the Plaintiff's business itself, but also for the two other topless cabarets which now operate in Jackson and three adult bookstores which operate now in the City of Jackson because those particular businesses will lose their sites at the expiration of the three-year grandfather period of the ordinance. Assuming that the Plaintiff is correct, at least some of these locations in Area I, or the Commerce Street area, would certainly be available for the adult bookstores. The Plaintiff has criticized these areas as not having adequate parking under the City's building codes for the operation of a cabaret type of business which the City equates to that of a restaurant. The City, on the other hand, relies on the case law which says that these businesses must compete along with other businesses and that other businesses in the area could lease additional parking area in the vicinity. Giving the City the benefit of that doubt, the Court finds that some of these sites would qualify. Also, there is a warehouse in the area which might accommodate this type of business. The Court notes that there are at least two other restaurants operating out of old warehouse buildings which have been successful in the City of Jackson, one of which happens to be on the same street.

There is a portion of Area M which lies in the southeast corner of the intersection of I-55 and I-20, just east of Gallatin Street, which would be an available alternative site. The Plaintiff claims that it is adjacent to a slaughterhouse, however, the sight is highly visible from two interstates and is accessible. Finally, the Court finds that the site proposed as K-1 by the City which lies on the north side of I-20, is an acceptable site. It lies along and has frontage on the frontage road and has good visibility and accessibility. It is a vacant area.

The question, therefore, arises as to whether these four sites containing maybe eight or ten possible locations are sufficient to meet the test for according reasonable alternative

avenues of communication. The City has argued that it has other sites available, and the Court has found otherwise. The Plaintiff, on the other hand, has argued that Renton teaches that large available acreage is required and that a substantial number of sites are required to reasonably offer an alternative.

The Court notes that there has been an extreme public interest in this matter, as indicated by newspaper and television coverage. The Court believes that this type of interest and obvious, strong public opposition should be factored into what is reasonable under the circumstances.

The Court accordingly rules that the number of sites available under the ordinance as found by the Court do not provide the Plaintiff with sufficient alternative sites for the carrying on of its proposed business. This ruling is without consideration of the other adult entertainment establishments which are already operating and without consideration of any other possible establishments that wish to engage in this type of business. If those are considered, then certainly the number of available sites would be reduced proportionately. For this reason also, the Court finds that the amendments to the zoning ordinance in question in this suit are unconstitutional. The Court accordingly will grant an injunction against the City prohibiting the City from enforcing its ordinance as amended on January 28, 1992.

That will be the ruling of the Court. Is there any request for additional findings or rulings from either party or for any clarification of any ruling made?

MR. MOORE: Not from the Plaintiff, Your Honor.

MR. BRASFIELD: Your Honor, we will -- the City will appeal. We don't need any further findings of fact. We will ask the Court for a stay of the ruling. Do you wish a hearing of briefs on that? I expect I will file a notice of appeal tomorrow.

THE COURT: All right. I think that the appropriate time to address a stay would be after you have filed your notice of appeal. I can't imagine that it would make a difference between today or next week. The testimony in the case has

shown that the Plaintiff has sought building permits and intends to make renovations of the property that it intends to open in and is not ready to open at this stage. If you wish to present a motion for a stay, certainly you may do so after filing your motion for appeal.

MR. BRASFIELD: All right, sir.

THE COURT: Anything further, Mr. Moore?

MR. MOORE: Your Honor, will the Court prepare the judgment or do I need to do that?

THE COURT: Let me ask you to do that, if you would, please, and present it to counsel opposite, at least by telephone, for suggestion.

MR. MOORE: Yes, sir. And with regard to costs, that would be taken up, under the local rules, after entry of the judgment; is that correct?

THE COURT: Yes, sir. You would simply present the judgment granting the Plaintiff an injunction with its costs. You may then under the local and the Federal Rules, present your costs to the clerk, and if there's any problem about that it can be presented later to the Court.

MR. MOORE: Yes, sir. More specifically what I was addressing is the award of attorneys fees. And my experience with the Court in the past has been that at times the Court wants that issue addressed before the judgment is entered and which is not exactly the way the local rules are written and I was trying to clarify that issue.

THE COURT: All right. Has the Plaintiff made a demand for attorneys fees in the complaint?

MR. MOORE: Yes, Your Honor.

THE COURT: All right. The local rule calls for your moving for attorneys fees.

MR. MOORE: Within 30 days of entry of the judgment.

THE COURT: Yes, sir. My suggestion under the circumstances -- and that does not prohibit the case being appealed. It is a matter that is retained by the District Court. My suggestion would be to simply follow the local rule, go

ahead and enter a judgment, although if you would rather, I can take up the attorneys fee matter before a judgment is entered.

MR. MOORE: No, I would rather the judgment be entered.

THE COURT: All right. If you will get me a judgment, then you will have the time period covered by the local rules for presentation of your motion for attorneys fees.

In regard to the motion for attorneys fees, I would recommend that you attempt to present the matter to the Court without the necessity for a hearing. Ordinarily that is done by the filing of a motion supported by an itemized statement of the time spent and a request for an hourly rate. That then is ordinarily supported by an appropriate affidavit addressing the issues that are required by the local rule. My suggestion would be, Mr. Moore, that you present it in that fashion and that Mr. Brasfield then submit whatever opposition you might have in writing, supported if you need to, by any counter affidavits or something, rather than having to have a hearing. The Court would probably get to the issue easier and understand your positions more readily in writing. For instance, if you object to certain claimed hours, you can specify those in some kind of logical order, referring back to whatever Mr. Moore has presented, and then the Court can address whether the hours are reasonable or whether it is required for the purpose of the lawsuit.

Certainly by making this statement I do not mean to foreclose any argument the City might regarding whether or not attorneys fees should be granted at all. That is a matter the Court will have to address at the first instance.

All right. It may also be that if you would confer, there may be some agreement as to the hours or the rate or total amount of the attorneys fees, even if there's issue open as to whether they should be awarded.

All right. Is there anything further before we stand in recess this afternoon?

MR. MOORE: No, Your Honor.

MR. BRASFIELD: No, sir.

THE COURT: If not, then the Court will stand in recess.

(Recess.)

* * * * * * * * * * * * *

CERTIFICATE

I, Celeste O. Werkheiser, Registered Professional Reporter, Certificate of Merit, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 24 pages contain a full, true, and correct transcript of the proceedings had in the aforenamed case at the time and place indicated.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 7th day of May, 1992.

Celeste O. Werkheiser

My Commission Expires:
June 7, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LAKELAND LOUNGE OF JACKSON, INC.
PLAINTIFF

V. CIVIL ACTION NO. J92-0123(B)(C)

CITY OF JACKSON, MISSISSIPPI
DEFENDANT

FINAL JUDGMENT

THIS CAUSE came before the Court for Trial on the Merits on plaintiff's Complaint under 42 U.S.C. § 1983 seeking a declaration by the Court that certain amendments to the zoning ordinance for the City, adopted by the City Council on January 28, 1992, violate the First Amendment protection of free speech, and an injunction prohibiting the City of Jackson from enforcing the amendment to the zoning ordinance adopted on January 28, 1992. The Court, having considered the pleadings, the evidence presented during a hearing on plaintiff's Motion for Temporary Restraining Order and presented during the trial on the merits, and arguments of counsel, rendered a Bench Opinion on April 30, 1992, declaring the amendments to the City of Jackson zoning ordinance adopted on January 28, 1992, to be unconstitutional in violation of the First Amendment. The Court further concluded, as set forth in detail in the Bench Opinion, that the City of Jackson should be enjoined from any efforts to enforce the zoning ordinance amendments adopted by the City Council on January 28, 1992.

IT IS, THEREFORE, ORDERED AND ADJUDGED AS FOLLOWS:

a. That the zoning ordinance amendments adopted by the Council for the City of Jackson on January 28, 1992, are declared unconstitutional in violation of the First Amendment because the City Council had no factual basis upon which it relied to determine that secondary effects result from the operation of adult entertainment establishments;

b. That the zoning ordinance amendments adopted by the Council for the City of Jackson on January 28, 1992, are declared unconstitutional because the amendments fail to provide reasonable alternative sites for communication of protected speech;

c. That the City of Jackson, its elected officials, officers, agents and employees are enjoined from enforcing any provisions of the amendments to the zoning ordinance which were adopted by the Council for the City of Jackson on January 28, 1992;

d. That the defendants are assessed with all costs of this action.

SO ORDERED AND ADJUDGED this 1st day of May, 1992.

_____
UNITED STATES DISTRICT JUDGE

Submitted by:

_____
MATTHEW M. MOORE
ATTORNEY AT LAW
P. O. Box 171
518 East Capitol Street
Suite 201
Jackson, MS 39205
(601) 355-5333
MSB #23283

Approved as to form only:

_____

CRAIG BRASFIELD
DEPUTY CITY ATTORNEY
P. O. Box 17
Jackson, MS 39205
(601) 960-1799
MSB #_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-7291

LAKELAND LOUNGE OF JACKSON, INC.

PLAINTIFF/APPELLEE

V.

CITY OF JACKSON, MISSISSIPPI

DEFENDANT/APPELLANT

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Oct. 5, 1992

Adult business challenged city's amendment to zoning ordinance to restrict such businesses to areas zoned for light industrial use and, with use permit, to some of the central business district. The United States District Court for the Southern District of Mississippi at Jackson, William Henry Barbour, Jr., Chief Judge, _____ F.Supp. _____, declared ordinance unconstitutional and permanently enjoined its enforcement. City appealed. The Court of Appeals, Jerry Smith, Circuit Judge, held that: (1) city council properly

considered secondary effects of adult businesses in amending zoning ordinance, and (2) city provided sufficient alternative avenues of expression for those businesses.

Reversed and remanded.

Politz, Chief Judge, dissented and filed opinion.

1. Constitutional Law 90.4(1)

City zoning ordinance which did not ban adult businesses outright but merely limited areas of city in which they might operate was properly analyzed as form of time, place, and manner regulation. U.S.C.A. Const.Amend. 1.

2. Constitutional Law 90.4(1)

While cities may not regulate sexually oriented establishments out of mere distaste for message they communicate, local governments can restrict adult businesses in order to control the bad "secondary effects" such as crime, deterioration of retail trade, and decrease in property values that the establishments bring. U.S.C.A. Const.Amend. 1.

3. Constitutional Law 90.4(1)
Zoning and Planning 167

City council properly considered secondary effects of adult businesses in amending zoning ordinance to restrict such businesses to areas zoned for light industrial use and, with use permit, to some of the central business district; drafters of ordinance relied upon studies of secondary effects, majority of counsel members received some information about those effects during open hearing of planning board, record did not suggest impermissible motive on part of council members, and preamble language took note of secondary effects. U.S.C.A. Const.Amend. 1.

4. Constitutional Law 90.4(1)
Zoning and Planning 167

City provided sufficient alternative avenues of expression for adult businesses in amending zoning ordinance to restrict those businesses to areas zoned for light industrial use and, with use permit, to some of the central business district; substantial number of potential sites existed for those businesses, and there was no requirement that specific proportion of municipality be open for adult businesses or that certain number of sites be available. U.S.C.A. Const.Amend. 1.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The City of Jackson, Mississippi ("Jackson") amended its zoning ordinance to restrict adult businesses to areas zoned for light industrial use and with a use permit, some of the central business district. The Lakeland Lounge of Jackson ("Lakeland"), which is such an establishment, challenged the ordinance, and the district court declared it unconstitutional because the members of the city council had not properly considered the secondary effects of sexually oriented businesses, so the ordinance was not content-neutral. Alternatively, the court found that the ordinance did not provide reasonable alternative avenues of communication. Finding no constitutional infirmity in what the city did, we reverse.

I.

In September 1991, a nightclub offering topless dancing opened in Jackson. The city acknowledges that it tried to close the club down for technical code violations, because of great public uproar, but failed. A few weeks later, another club opened.

In September, the mayor had directed the zoning administrator to begin the process for the adoption of some measure to address the public concern. The city attorney's office and the planning department began to assemble materials

concerning adult entertainment and to draft a new regulation. They received examples of other communities' zoning ordinances regulating adult businesses, studies about the effects of such establishments upon their communities, and legal opinions. Several public hearings were held to discuss the matter, including an open meeting of the planning board on January 21, 1992, to which five of the seven members of the city council were invited and five attended. Immediately following that meeting, and also on January 21, the city council met, and the ordinance was presented but held for final adoption a week later.

In January 1992, Lakeland Lounge of Jackson was incorporated, for the purpose of operating a restaurant/lounge with topless dancing. It received beer licenses from the city and state and executed a lease for a property in an area zoned "general commercial."

On January 28, 1992, the City council adopted an amendment to Jackson's zoning ordinance, seeking to disperse adult entertainment establishments. Such establishments were relegated to "light industrial" zoned areas, and also could be located in the central business district if they obtained use permits. Additionally, adult establishments could not be within 250 feet from each other or within 1,000 feet of any residentially zoned property, church, school, park, or playground. The provision also gave pre-existing establishments three years to comply.

Lakeland filed a complaint in February 1992, seeking to have the ordinance declared unconstitutional and its enforcement enjoined. The trial court denied Lakeland's motion for a temporary restraining order. After a bench trial, the court declared the ordinance unconstitutional and permanently enjoined its enforcement. _____ F.Supp. _____. Lakeland Lounge opened for business soon afterward.

II.

[1,2] The Jackson ordinance does not ban adult businesses outright but merely limits the areas of the city in which they may operate. It is thus properly analyzed as a form

of time, place, and manner regulation. City of Renton v. Playtime Theatres, 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986)(citing Young v. American Mini Theatres, 427 U.S. 50, 63 & n.18, 96 S.Ct. 2440, 2449 & n. 18, 49 L.Ed.2d 310 (1976). As such a regulation, it presumptively violates the First Amendment if it was "enacted for the purpose of restraining speech on the basis to serve a substantial government interest" and may "not unreasonably limit alternative avenues of communication." Id. 475 U.S. at 47, 106 S.Ct. at 928. Cities may not regulate sexually oriented establishments out of mere distaste for the message they communicate--that would be content-based infringement upon expression entitled to at least some protection under the First Amendment. See, e.g., Barnes v. Glen Theatre, _____ U.S. _____, _____, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991)(recognizing that nude dancing is "expressive conduct within the outer perimeter of the First Amendment")(plurality opinion); see Renton, 475 U.S. at 46-49, 106 S.Ct. at 928-30 (discussing requirement of content-neutrality). Local governments, however, can restrict adult businesses in order to control the bad "secondary effects"--such as crime, deterioration of their retail trade, and a decrease in property values--that the establishments bring. See id. at 46, 106 S.Ct. at 928.

In determining whether the amended ordinance was actually content-neutral, the district court followed the analysis laid out in United States v. O'Brien, 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968). The court stated that it needed to determine the predominant factor motivating the city council in passing the ordinance; it concluded that the city had not shown that that factor was concern over secondary effects.

The court first observed that the ordinance obviously, in its preamble, took note of the secondary effects. Second, it stated that the city had attempted to regulate, rather than prohibit, the adult business. Third, though, the court stated that the city did not show whether the existence of secondary effects

had a basis in fact or, more importantly here, "whether that factual basis was considered by the [c]ity in passing the ordinance." The court held that the city council had an insufficient factual predicate by which to base its ordinance upon secondary effects; therefore, the city had not shown that the ordinance was content-neutral.

The district court based its analysis of the bases for the ordinance upon Renton, in which the Court stated that a city may establish its interest in a regulation by relying upon evidence "reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52, 106 S.Ct. at 931. The Renton Court held that in enacting an adult business regulation, a city's justifications were not necessarily "conclusory and speculative" where the municipality based its opinion that such businesses had bad secondary effects upon studies of other communities. Id. at 50, 106 S.Ct. at 930.

In the instant case, the district court held that the city had to show that it properly adopted the zoning ordinance. It stated that there is no testimony that the members of the city council ever looked at the studies about secondary effects or that they received any summary of those studies from their staff. Although one council member testified that she had received materials about such studies, they came from constituents; she did not testify that she had received copies of the material that the city staffs used or that she had provided her materials to her colleagues.

Noting that it was a close question, the court ruled that the city council should have allowed at least some presentation summarizing the secondary effects, upon which the council purported to rely, and that the council had not produced any evidence that "it relied upon any formal studies to reach the conclusion that there would exist secondary effects if these businesses would be allowed to continue to operate." Concluding that the city had not shown that the amendment was content-neutral, the court held it was unconstitutional.

III.

[3] We believe that the district court clearly erred and that the record shows that the city council had sufficient information before it to enact a permissible ordinance. First, the office of planning, city attorney's office, and the ordinance review committee (a subcommittee of the planning board) drafted the ordinance, and they unquestionably considered, and relied upon, the studies as to the secondary effects of sexually oriented business while they were drafting the amendment. Further, the council could properly place some reliance upon others to do research as state law requires that the planning board make recommendations to the council regarding zoning amendments. We perceive no constitutional requirement that the council members personally physically review the studies of secondary effects; such a holding would fly in the face of legislative reality.[1]

Second, although the city council never received a written report or summary of the studies, the city planning board held a public meeting at which the planning director and other city staff members and citizens discussed secondary effects and the work that had gone into the preparation of the proposed ordinance. As testimony and the official minutes of the meeting show, five of the seven members of the city council were present at that meeting; as the ordinance passed by a six-to-one vote, a majority of the council must have both voted for the ordinance and attended the meeting.

Third, the language of the amendment indicates the council's concern with the secondary effects. The preamble states as follows:

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[1]In light of Renton's holding that a municipality may rely upon other cities' studies of secondary effect, 475 U.S. at 50, 106 S.Ct. at 930, and discussion in Barnes of the possibility that ordinances may be justified by their secondary effects, without any actual legislative finding, _____ U.S. at _____, 111 S.Ct. at 2470 (opinion of Souter, J.), one might argue that legislative findings are no longer be necessary, as the record as to secondary effects has already been made. We need not reach such a conclusion to decide this case, however.

> [T]he Planning Board and City Council of the City of Jackson, Mississippi, find that there is substantial evidence, including numerous studies, reports, and findings on the potential harmful effect of adult entertainment uses made by other cities, experts, city planners, etc., which document that such uses adversely affect property values, cause an increase in crime, encourage businesses to move elsewhere, and contribute to neighborhood blight.

It then asserts that it was "necessary, expedient and in the best interest" of the citizenry

> to regulate the operation and location of adult entertainment establishments for the purpose of stemming a potential increase in the criminal activities and disturbances of the peace and good order of the community, maintaining property values, preventing injuries to residential neighborhoods and commercial districts, and protecting and preserving the quality of life through effective land use planning.

This language might not save a statute that was formulated without specific attention to secondary effects. Nevertheless, in context here, where (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the councilmembers did receive some information about the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggests impermissible motives on the part of the council members, the language of the preamble shows the city council's awareness of the studies upon which the planning staff relied when framing the ordinance and reflects that a reasonable legislature with constitutional motives could have enacted the ordinance. See

SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988), cert.denied, 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989).[2]

IV.

[4] Having decided that the city council had not properly considered the ordinance, the district court did not need to determine whether the zoning plan provided sufficient alternative opportunities for the regulated expression. It did so nevertheless, apparently foreseeing possible reversal on the first issue or seeking to guide the city council's future deliberations.

The court stated that any regulation must provide reasonable alternative avenues of communication for the protected expression. Renton, 475 U.S. at 54, 106 S.Ct. at 932. Basing its analysis upon Renton and Woodall v. City of El Paso, 950 F.2d 255 (5th Cir.), modified, 959 F.2d 1305 (5th Cir. 1992), petition for cert. filed (July 15, 1992), it asserted that a court must consider whether the regulation leaves available land that is physically, legally, and economically suited for adult entertainment businesses. The court found that most of the land zoned for adult businesses was actually unavailable; it then mentioned that four areas with eight to ten locations were available and suitable. Noting that Lakeland argued that, under Renton, large available acreage and a substantial number of sites are required in order reasonably to offer alternative avenues of expression, the court held that those sites did not provide Lakeland with sufficient alternative sites for the carrying on of its business; if other current and future adult entertainment

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[2] "[We] do not ask whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities." (See also 11126 Baltimore Blvd. v. Prince George's County, 886 F.2d 1415, 1420 (4th Cir. 1989)(intent as set out in legislation's preambles relevant to determination of content neutrality), cert. granted, judgment vacated, and case remanded on other grounds, 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990).

establishments were factored into the calculus, the number of available sites would be reduced proportionately.

We disagree. First, the district court stated that an unspecified number of the proposed locations were inadequate because they were "in remote areas of the city and are not in any area where other retail or commercial development is located. Clearly this type of area would not be reasonable from any macroeconomic analysis standpoint for any type of retail business, which would be the general classification of topless cabarets."

This analysis is based upon an incorrect view of which legal standard to apply. The initial panel opinion in Woodall laid out a doctrine of economic impracticality, essentially stating that a site was impractical if no adult business possibly could expect to profit by opening there. 950 F.2d at 261 n.5. That section of the opinion, which presumably was the source of the district court's "macroeconomic" language, has been withdrawn and thus has no precedential value. With that discussion deleted, Woodall merely states that "land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there." 950 F.2d at 263.[3] The fact that these locations do not seem particularly desirable for economic reasons does not matter. As the Supreme Court has noted, "The inquiry for First Amendment purposes is not concerned with economic impact." Renton, 475 S.Ct. at 54, 106 S.Ct. at 932, (quoting Young v. American Mini Theatres, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456, 49 L.Ed.2d 310 (1976) Powell, J., concurring)). As we have noted, "alternative sites need not be commercially viable." SDJ, 837 F.2d at 1276-77 (citing Renton). See also D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 147 (4th Cir. 1991)(city not obliged to provide commercially desirable land).

Nothing in the instant record indicates that all or even most of the locations are inaccessible, unsafe, or without utilities

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[3]See also modified Woodall opinion, 959 F.2d at 1306.

or infrastructure or that legal obstacles exist to their use. See Woodall I, 950 F.2d at 261-62; Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982). Thus, although the record does not permit us to say with precision how many additional sites exist, a substantial number of potential sites do.

Moreover, there is no requirement in Renton, Woodall, or elsewhere that a specific proportion of a municipality be open for adult businesses or that a certain number of sites be available. According to the record, two adult entertainment clubs and three adult bookstores were operating in Jackson at the time of the trial; so including Lakeland Lounge, there are six such establishments in the city. As a matter of arithmetic, even without the sites the district court stated were remote, there are more "reasonable" sites available than businesses with demands for them, even if the five previously existing businesses decided to move into the zoned areas (which they need not do for three years under the amortization provisions of the ordinance).

Given the limited demand for sites for sexually oriented businesses, this ordinance does not reduce the number of establishments that can open in Jackson, so it does not limit expression.[4] When the "remote" areas of the city are included, it is plain that Lakeland has many alternative locations for its business.

V.

We thus find that the Jackson City Council properly considered the secondary effects of adult business and provided sufficient alternative avenues of expression for them. The judgment of the district court is REVERSED, and this matter is REMANDED for further proceedings as appropriate.

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[4]See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 71, 101 S.Ct. 2176, 2183, 68 L.Ed.2d 671 (1981)(ordinance banning nude dancing in American Mini Theatres distinguished, because it "did not affect the number of adult movie theaters that could operate in the city)".

POLITZ, Chief Judge, dissenting:

I must respectfully dissent because I find that the ordinance of the City of Jackson, Mississippi violates the first amendment. The ordinance defines its regulatory scope on the basis of "adult" content and is therefore not content-neutral; it may only be accorded the deferential review given content-neutral regulations if it meets the requirements of a time, place, and manner restriction.[5] In my view, these requirements are not met. The Jackson City Council has not demonstrated that its predominant intent was to control negative secondary effects of sexually oriented businesses. In addition, even assuming the ordinance to be a content-neutral restraint of free speech, it fails because alternative channels of communication of the protected speech at issue here are unavailable.

The ordinance does not qualify for the deferential review accorded content-neutral restraints because it was not "designed to combat the undesirable secondary effects" of the regulated

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[5]See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); see also SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1273 (5th Cir. 1988)("The [Renton] Court submitted the Renton ordinance to the analysis reserved for content-neutral restraints, although the ordinance marked businesses by the content of their product."); Note, The Content Distinction in Free Speech Analysis after Renton, 102 Harv.L.Rev. 1904, 1907-08 (1989)(explaining that Renton applies a "content-neutral" standard of review to "content-based time, place, and manner regulations").

The Supreme Court in Barnes v. Glen Theatre, Inc., _____ U.S. _____, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), analyzed a public exposure statute pursuant to the four-part test enunciated in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The O'Brien test applies to statutes without content-based references; it includes an analysis of the extent to which the governmental interest is related to the suppression of free expression. The Barnes decision did not suggest an expansion of Renton's looser scrutiny for content-based statutes; the decision even states that the time, place, and manner test was originally developed for expression taking place in a "public forum" and that Renton was "at least one occasion" in which the Court deviated from this application. _____ U.S. _____, 111 S.Ct. at 2460.

business.[6] Unless the predominant concern of the regulators was to prevent these alleged secondary effects, we should not base our review of the ordinance on the presumption that it is a time, place, and manner restriction unrelated to the suppression of free expression.[7] To assess the regulators' predominant concern, "we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose--a study or findings."[8] Jackson had the burden of establishing that evidence before the city council entitled the council to reach its conclusion.[9] The test does not inquire into the council members' subjective beliefs but, rather, searches the legislative history of the ordinance for "an actual basis" upon which an objective regulator could assess the purported secondary effects.[10] Although the City need not conduct its own independent study and is certainly entitled to rely upon empirical data from other municipalities, the regulators must have such studies--and not just the ordinance itself--before them.[11]

Uncontroverted testimony before the district court reveals that the Jackson Planning Board submitted no written materials to the city council. The ordinance preamble declares that the City of Jackson intended to regulate secondary effects, yet the city council members did not see--much less rely upon--the data

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[6]City of Renton, 475 U.S. at 49, 106 S.Ct. at 929.

[7]Id. at 47, 48, 106 S.Ct. at 928, 929; SDJ, Inc., 837 F.2d at 1273 (quoting City of Renton's reference to the legislatures' "predominant concern").

[8]SDJ, Inc., 837 F.2d at 1274.

[9]City of Renton, 475 U.S. 51-52, 106 S.Ct. at 931; SDJ, Inc., 837 F.2d at 1274.

[10]SDJ, Inc., 837 F.2d at 1274.

[11]Id. ("[W]e are persuaded that the City Council considered those studies themselves and not merely the ordinances for which the studies provided support." (emphasis added)).

which purportedly engendered their alleged "predominant" concerns. According to the record, four of the seven city council members who voted for the ordinance did attend a public meeting of the Jackson Planning Board, but the minutes of that meeting and the testimony before the trial judge did not reflect that any empirical study data were orally recited or meaningfully discussed.[12] One city council member, Margaret C. Barrett, did receive some materials regarding secondary effects from her

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[12]The Minutes of the January 21, 1992 Jackson City Planning Board Public Hearing reflect that Quintus Greene, Director of the Office of Planning, made the following comments:

> Mr. Greene gave a brief summary of the research and intent that have gone into drafting the proposed adult entertainment amendments to the Zoning Ordinance. He mentioned that adult entertainment establishments would be permitted by right in I-1 (light) Industrial Districts and would be permitted by Use Permit in the C-4 Central Business District. He noted these regulations would prohibit such uses within 1000 feet of any residentially zoned property, church, school, park or playground. Also, no adult entertainment establishments could be located within 250 feet of any other such use. He displayed a map of the City which depicts all of the I-1 Districts and the C-4 District, where such uses could be allowed.

The district court very accurately described the testimony evidence regarding the hearing:

> The only testimony that the Court has concerning what went on at the hearing came from the testimony of Quintus Greene of the City Planning and Zoning staff, and Mrs. Barrett, the councilwoman. This testimony showed no consideration of the materials sent by the American Planners Association nor any other type of material that either the City Planning and Zoning people had or that Mrs. Barrett herself had...
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> There is no testimony whatsoever that the City Council members themselves ever looked at the studies relied upon by its staff, or received any written summary of those studies, or received any oral summary of those studies.

(Emphasis added.) The majority would ignore these factual findings which wear the buckler and shield of Fed.R.Civ.P. 52(a).

constituents, but she did not circulate this data to her colleagues on the council. Because the council did not examine even an extract of the studies upon which its predominant concerns purportedly rested, I find no basis to justify reviewing this ordinance as a content-neutral regulation. The City used the pretext of technical code violations to attempt to close Jackson's first adult entertainment club. It would appear that the ordinance's preamble is but another such.

The facts of this case stand in stark contrast to those reviewed by the SDJ, Inc. court, wherein a specially compiled report of community effects was filed with and adopted by the city council.[13] Similarly, the Renton Court quotes the material before the Renton City Council which described secondary effects of adult entertainment and study results.[14] Indeed, the Basiardanes v. City of Galveston[15] court objected that "there [was] no evidence in the record that the Galveston City Council passed [the ordinance] after careful consideration or study of the effects of adult theaters on urban life."[16]

In addition, I am not persuaded that the Jackson ordinance passes constitutional muster even as a time, place, and manner restriction. Even a content-neutral ordinance regulating protected speech must be narrowly tailored to serve a substantial governmental interest and must allow for reasonable alternative avenues of communication.[17] The Jackson ordinance bans "[a]dult arcades, adult bookstores, adult cabarets, adult entertainment establishments, adult motels, and adult motion

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[13]See SDJ, Inc., 837 F.2d at 1272.

[14]See City of Renton, 475 U.S. at 51, 106 S.Ct. at 931.

[15]682 F.2d 1203 (5th Cir. 1982).

[16]Basiardanes, 682 F.2d at 1215.

[17]City of Renton, 475 U.S. at 50, 106 S.Ct. at 930; SDJ, Inc., 837 F.2d at 1273.

picture theaters" from all areas except those zoned as light industrial. In the light industrial zones such establishments may not be located within 250 feet of each other or 1,000 feet from any residentially zoned property, church, school, park, or playground. By the City's own account to the district court, only 879 acres of Jackson's approximate 70,400 acres are available for adult entertainment uses.[18] This is approximately 1.2 percent of the land mass of the City, as compared with the more than 5 percent which was available in Renton.[19] In the district court the City argued that 21 general areas were available; it presented testimony regarding 32 specific sites. By contrast, the SDJ, Inc. court, which admittedly analyzed an ordinance in the much larger city of Houston, nonetheless reviewed stronger evidence. One expert responsible for analyzing only 20 percent of the City specified 40 available sites in this portion alone. Other evidence demonstrated that at least 100 and perhaps, up to tens of thousands of alternative sites existed.[20] Accordingly, accepting Jackson's argument at full face value, its list of the available sites is less than impressive.

From my review of the record I cannot, however, accept the City's list of sites. I cannot because I cannot justify dismissing the district court's factual findings in this case. The district court found only four available areas containing eight to ten prospective sites. This finding is manifestly not clearly erroneous. Although the court makes one reference to macroeconomics, which was discussed in the vacated portion of Woodall v. City of El Paso,[21] the trial court also discounted

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[18]The City had originally argued that a ceiling of 1,043 acres were available but retreated from this position when faced with evidence regarding a restrictive covenant on 163 acres.

[19]City of Renton, 475 U.S. at 53, 106 S.Ct. at 932.

[20]SDJ, Inc., 837 F.2d at 1277.

[21]950 F.2d 255 (5th Cir.), modified, 959 F.2d 1305 (5th Cir. 1992).

proposed sites due to physical impossibilities. The district court does not individually apply each reason for unavailability to each site rejected. But the district court's detailed discussion of the available locales nonetheless reveals that it did not place upon the City a duty of providing "sites at bargain prices."[22] For example, the trial court considered warehouses as available because they could be converted to lounges. It also considered a lot next to a slaughterhouse an available adult entertainment site. Referencing the Renton economic rule, the trial court specifically discounted Lakeland's arguments that lack of parking rendered certain business district sites inadequate.

At the very least, I must conclude that this case should be remanded for consideration pursuant to our modifications of Woodall. The record clearly shows that physical impossibility, rather than the Woodall macroeconomics theory, occasioned a discounting of a majority of the City's proposed 879 acres. The district court described one 300-acre site which lacked physical access as "swampland." Another large site in the northwest sector of the City was described as a floodplain. The testimony of Lakeland's expert also revealed that other alleged sites were adjacent to high voltage power lines or within 1,000 feet of a prohibited use. I therefore must disagree with the majority's conclusion that "nothing in the instant record indicates that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure or that legal obstacles exist to their use."

I respectfully dissent.

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[22]City of Renton, 475 U.S. at 54, 106 S.Ct. at 932.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-7291

LAKELAND LOUNGE OF JACKSON, INC.

PLAINTIFF/APPELLEE

V.

CITY OF JACKSON, MISSISSIPPI

DEFENDANT/APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 5, 1992, 5 Cir. 198__, _____F.2d____)

(NOVEMBER 4, 1992)

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

ORDINANCE AMENDING ZONING ORDINANCE OF JACKSON, MISSISSIPPI, AS ADOPTED MAY 29, 1974, AND SUBSEQUENTLY AMENDED, REGULATING THE LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS; AND FOR RELATED PURPOSES

WHEREAS, Mississippi Statutes empower the City Council of Jackson, Mississippi, with the legislative and governing authority to carry on City government in a manner not inconsistent with general law and regulate the use of land within the City of Jackson, Mississippi, through planning and zoning regulations; and

WHEREAS, the Planning Board and City Council of the City of Jackson, Mississippi, recognize that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon adjacent areas, such that special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood; and

WHEREAS, the Planning Board and City Council of the City of Jackson, Mississippi, find that there is substantial evidence, including numerous studies, reports, and findings on the potential harmful effect of adult entertainment uses made by other cities, experts, city planners, etc., which document that such uses adversely affect property values, cause an increase in crime, encourage businesses to move elsewhere, and contribute to neighborhood blight; and

WHEREAS, the Planning Board and City Council of the City of Jackson, Mississippi, find it necessary, expedient and in the best interest of the citizens of Jackson, Mississippi, to regulate the operation and location of adult entertainment establishments for the purpose of stemming a potential increase

in the criminal activities and disturbances of the peace and good order of the community, maintaining property values, preventing injuries to residential neighborhoods and commercial districts, and protecting and preserving the quality of life through effective land use planning; and

WHEREAS, the Planning Board and City Council of Jackson, Mississippi, find that such regulation would protect the health, safety, and welfare of the residents of Jackson, Mississippi.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF JACKSON, MISSISSIPPI:

SECTION 1. That Section 202.01(a) of the Zoning Ordinance of Jackson, Mississippi, is hereby created to read as follows:

202.01(a) Adult Arcade An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors, or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

SECTION 2. That Section 202.01(b) of the Zoning Ordinance of Jackson, Mississippi, is hereby created to read as follows:

202.01(b) Adult Bookstore An establishment which has as a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:

A. Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas," or

B. instruments, devices or paraphernalia which are designed for use in connection with "specified sexual activities."

SECTION 3. That Section 202.01(c) of the Zoning Ordinance of Jackson, Mississippi, is hereby created to read as follows:

202.01(c) Adult Cabaret A nightclub, bar, restaurant, theater, or similar establishment which regularly features live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities," or films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

SECTION 4. That Section 202.01(d) of the Zoning Ordinance of Jackson, Mississippi, is hereby created to read as follows:

202.01(d) Adult Entertainment Establishment An adult arcade, adult bookstore, adult cabaret, adult motel, adult motion picture theater, or similar establishment which regularly features or depicts behavior which is characterized by the exposure of "specified anatomical areas," or where any employee, operator or owner exposes his/her "specified anatomical area" for viewing by patrons.

SECTION 5. That Section 202.01(e) of the Zoning Ordinance of Jackson, Mississippi, is hereby created to read as follows:

202.01(e) Adult Motel A motel or similar establishment which includes the word "adult" in any name it uses or otherwise advertises the presentation of adult material, offering public accommodations for any form of consideration which provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

SECTION 6. That Section 202.01(f) of the Zoning Ordinance of the City of Jackson, Mississippi, is hereby created to read as follows:

202.01(f) Adult Motion Picture Theater An establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

SECTION 7. That Section 202.80(a) of the Zoning Ordinance of the City of Jackson, Mississippi, is hereby created to read as follows:

202.80(a) Specified Anatomical Areas Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or less than 50% of the female breast below a point immediately above the top of the areolae; or human male genitals in a discernibly turgid state even if completely and opaquely covered.

SECTION 8. That Section 202.80(b) of the Zoning Ordinance of the City of Jackson, Mississippi, is hereby created to read as follows:

202.80(b) Specified Sexual Activity Human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, or sodomy; fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts; flagellation or torture in the context of a sexual relationship; masochism, erotic or sexually oriented torture, beating or the infliction of physical pain; erotic touching, fondling or other such contact with an animal by a human being; or human excretion, urination, menstruation, vaginal or anal irrigation as part of or in connection with any of the activities set forth in this section.

SECTION 9. That Section 701 of the Zoning Ordinance of Jackson, Mississippi, is hereby amended to read as follows:

Section 701 General Provisions

The uses permitted in all commercial districts are as follows:

1. Commercial, as hereinafter regulated;
2. Agriculture, as may be compatible;
3. Parks, open spaces, and recreational areas including playgrounds;
4. Libraries;
5. Schools, including public, private and parochial, and country clubs, all on sites of not less than five (5) acres;
6. Churches; provided all requirements contained herein for off-street parking are complied with;
7. Public utility facilities and structures required to provide essential public services, provided such facilities and structures are architecturally compatible or screened and landscaped in keeping with the neighborhood, all as approved by the City Planning Board;
8. Public facilities and uses necessary for conducting the business of operating the City, County, State, and/or Federal Government;
9. Accessory uses and structures shall be allowed, but are not permitted within the required minimum setbacks other than access to rear or side of building;
10. For purposes of this Ordinance, separation of uses shall be defined as the distance from property line to property line.

SECTION 10. That Section 702.05.01(a) of the Zoning Ordinance of Jackson, Mississippi, is hereby created to read as follows:

702.05.01(a) Uses which may be permitted as Use Permits:

1. Any and all Use Permits permitted in the C-3 Commercial District.

2. Adult arcades, adult bookstores, adult cabarets, adult entertainment establishments, adult motels and adult motion picture theaters.

SECTION 11. That Section 702.05.2 of the Zoning Ordinance of Jackson, Mississippi, is hereby amended to read as follows:

702.05.02 Regulations:

1. There shall be no minimum setbacks, lot widths, or lot areas in the Central Business District.
2. Building height shall be limited to twenty-five (25) stories or three hundred seventy-five (375) feet unless otherwise approved by the zoning Committee, based on building setback.
3. All regulations of the City Fire Marshal shall be complied with in every case.
4. No adult arcade, adult bookstore, adult cabaret, adult entertainment establishment, adult motel, or adult motion picture, as defined in this Ordinance, shall be located within two hundred fifty (250) feet of any other such use, or located within one thousand (1,000) feet of any residentially zoned property, church, school, park, or playground. No separation is required for adult entertainment establishments under a common roof with single proprietorship and a single entrance.

SECTION 12. That Section 801 of the Zoning Ordinance of Jackson, Mississippi, is hereby amended to read as follows:

801 General Provisions

To promote the health, safety, morals, and general welfare of the City, all industry locating in I-1, I-2, and TIP, as in other districts of the City, shall be considered subject to the requirements and regulations of the appropriate Local, State, and Federal Agencies concerned with pollution control and abatement. For

purposes of this Ordinance, separation of uses shall be defined as the distance from property line to property line.

SECTION 13. That Section 802.01.1 of the Zoning Ordinance of Jackson, Mississippi, is hereby amended to read as follows:

802.01.1 Uses Permitted

1. Light manufacturing industries.
2. Uses as permitted in Commercial "C" Districts, including trade schools but excluding public, private and parochial schools, hospitals, convalescent homes, and apartments.
3. Truck terminals, warehouses, and storage buildings.
4. Wholesale and supply houses, including building material supplies.
5. Bulk storage and wholesale dispensing of products and materials with the exception of those products and materials that by their nature are considered explosive or otherwise hazardous to other industrial uses and as determined by the City Planning Board.
6. Transient Trailer Parks, subject to all regulations set forth by this Ordinance for R-7 Mobile Home Park District.
7. Planned industrial park.
8. Adult arcades, adult bookstores, adult cabarets, adult entertainment establishments, adult motels, and adult motion picture theaters.

SECTION 14. That Section 802.01.2 of the Zoning Ordinance of Jackson, Mississippi, is hereby amended to read as follows:

802.01.2 Regulations:

1. Regulations shall be the same as in the C-3 Commercial District, except that where the district adjoins residentially zoned property,

screening may be required by the City Planning Board to protect the integrity of the residential area.

2. Outdoor storage shall be at the sides or rear of the site, and shall be totally encircled or screened by a fence, planting, or other suitable visual barrier.

3. No adult arcade, adult bookstore, adult cabaret, adult entertainment establishment, adult motel, or adult motion picture theater, as defined in this Ordinance, shall be located within two hundred fifty (250) feet of any other such use, or located within one thousand (1,000) feet of any residentially zoned property, church, school, park, or playground. No separation is required for adult entertainment establishments under a common roof with single proprietorship and a single entrance.

SECTION 15. That Section 802.02.01 of the Zoning Ordinance of Jackson, Mississippi, is hereby amended to read as follows:

1. Any uses permitted in I-1 Light Industrial District, except adult arcades, adult bookstores, adult cabarets, adult entertainment establishments, adult motels, and adult motion picture theaters.

SECTION 16.

(a) That any adult arcade, adult bookstore, adult cabaret, adult entertainment establishment, adult motel, or adult motion picture theatre, as defined in this ordinance, in existence at the time of adoption of this ordinance which violates or does not conform to the provisions hereof (hereafter, a "pre-existing, nonconforming business") shall conform to the provisions of this ordinance within a period of three (3) years from said adoption of this ordinance.

(b) The City Planning Board may grant an extension of time for continued operation after the conclusion of this grace period if the owner of the pre-existing, nonconforming business proves that he is unable to recoup his investment in such enterprise by that date. In order to secure an extension of time, the owner must submit to the City Planning Board a written request for such extension at least sixty (60) days prior to the expiration of the three-year grace period. No application for extension received by the City Planning Board after such time shall be considered. Such written request shall set forth the following information.

(1) the amount of the owner's investment in the pre-existing, nonconforming business through the effective date of this ordinance;

(2) the amount of such investment that has been or will have been realized at the conclusion of the three-year grace period;

(3) the life expectancy of the existing enterprise;

(4) the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

This information shall be supported by relevant documentary evidence such as financial statements and tax records. Copies of such documentary evidence must be attached to the request for extension, and refusal or failure to provide this information as required shall constitute a waiver of the right to seek an extension of time in which to operate.

(c) The City Planning Board shall notify an applicant for an extension of time of the time and place of a hearing to be held on such request before the City Planning Board. After such hearing, the City Planning Board shall issue a written order on the request for extension. If the owner desires to appeal the City

Planning Board's order, he may do so by following the procedures for appeal to the City Council pursuant to the provisions of the Zoning Ordinance of Jackson, Mississippi, as amended. Extensions that are granted shall specify a date certain for closure, and shall not be valid for operation at any other location.

SECTION 17.

If any provision, section, subsection, sentence, clause or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

SECTION 18. That this ordinance shall be in force and effect thirty (30) days after passage.

Yeas - Armstrong, Barrett, Boyles, Roan, Stokes, and Weaver. Total - 6.

Nays - Foster - 1.

Absent - None.

ATTEST

Gayrytha F. Huff
City Clerk

I, Gayrytha F. Huff, the duly appointed, qualified and acting City Clerk and lawful custodian of records of the Council and seal of said City of Jackson, Mississippi, certify that the foregoing is a true and exact copy of an Ordinance passed by the City Council at its regular meeting on January 28, 1992, and recorded in Minute Book "4-L," pages 265-269.

WITNESS my signature and official seal of office, this the 3rd day of March, 1992.

(SEAL)

Gayrytha F. Huff
City Clerk